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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 266

JOHNS-MANVILLE CORPORATION, *Petitioner*,

v.

ITALIT, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. WILLARD HAYES
730 - 15th Street, N. W.
Washington 5, D. C.
Attorney for Petitioner

IRVIN H. RIMEL
730 - 15th Street, N. W.
Washington 5, D. C.
Of Counsel

JOHN A. McKINNEY
JOSEPH J. KELLY
J-M Research and Engineering Center
Manville, N. J.
Of Counsel

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Petitioner, Johns-Manville Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 16, 1964.

THE OPINIONS BELOW

The opinion of the district court is reported in 209 F. Supp. 798, and the opinion of the court of appeals is reported in 331 F.2d 663. Both opinions are reproduced in full in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 16, 1964. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The questions concern Rule 52(a) of the Federal Rules of Civil Procedure and its relation to due process of law. The trial court heard conflicting expert and other testimony and considered scientific documentary evidence with respect to disputed fact issues involving the physical properties and functions of a rubber sealing ring or gasket. Its decision in favor of petitioner (plaintiff below) was based upon detailed findings of subsidiary and ultimate fact drawn from, and in large part literally referring to, such testimony and documentary evidence. These findings show that the trial court had weighed the qualifications and credibility of the witnesses. The decisions of this Court establish the principle that findings of fact may be set aside as "clearly erroneous" under Rule 52(a) only if *after a specific consideration of the entire evidence* they are found to be either:

(a) not supported by substantial evidence, or

(b) even though supported by substantial evidence, contrary to the clear weight of the evidence.

In the present case, the court of appeals set aside findings of fact without a single reference to the testimony or documentary evidence, to the qualifications or credibility of the witnesses, or to the findings of the trial

court. Therefore, the questions presented for review are:

1. When a court of appeals ignores or violates the requirements of Rule 52(a) and thereby destroys a valuable property right, is the owner of the right "deprived of . . . property without due process of law"?

2. Does the sound administration of justice require, in the application of Rule 52(a), that when a trial court's detailed findings of scientific fact are set aside by a reviewing court, the reviewing court must review the entire evidence, must specifically compare the findings with the evidence and must demonstrate in what respect any findings set aside are not supported by substantial evidence or are contrary to the clear weight of the evidence?

3. May a court of appeals set aside a trial court's findings of fact for the reason that "the district court entered findings of fact and conclusions of law which, except for some minor changes, had been prepared by counsel . . ."?

CONSTITUTIONAL PROVISION INVOLVED

"No person shall . . . be deprived of . . . property, without due process of law: . . .". Constitution of the United States of America, Fifth Amendment.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

"Rule 52.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing

interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .".

STATEMENT OF THE CASE

Petitioner brought action against respondent in May 1960 for patent infringement, in the U. S. District Court for the Southern District of Florida. Jurisdiction was based on Title 28 U.S.C. Sections 1338(a) and 1400(b), and also on Title 35 U.S.C. Section 281. The case was tried August 14, 15 and 16, 1961, before Emett C. Choate, District Judge, without a jury. At the trial, five witnesses including an expert testified on behalf of petitioner; four witnesses including an expert testified on behalf of respondent, and a total of 185 exhibits were introduced.

An interlocutory judgment was entered, adjudging petitioner's patent valid and infringed. The opinion of the district court is reproduced herein as Appendix A. The findings of the court are detailed, replete with references to the evidence, and many of them refer to the testimony and credibility of the witnesses at the trial. The relative qualifications of the expert witnesses were an important element in judging the facts. The trial court made twelve detailed subsidiary findings of scientific fact, to the effect that petitioner's patent was literally infringed by respondent's device, and also that respondent's device was the full equivalent of the patented device "as it performs substan-

tially the same functions in substantially the same way to obtain the same results". (Appendix A, Finding 36)

At the trial respondent offered no evidence whatever on the issue of equivalence. In its brief on appeal respondent declined to compare any of the trial court's findings with the evidence. Its presentation to the court of appeals consisted of a reiteration of statements of fact, without any reference to the record, these statements already having been made to and rejected by the trial court on the basis of the testimony and other evidence.

On appeal, the court of appeals affirmed the findings and conclusions on the issue of validity, specifically stating that the findings on this issue were not "clearly erroneous". The opinion is reproduced herein as Appendix B.

The court of appeals reversed the judgment below on the issue of infringement and this petition is directed generally to that section of the court of appeals opinion in which this issue is discussed; namely, Appendix B pages 6 through 12. *In these pages there is not a single reference to any finding of fact by the trial judge, to the evidence or to the issue of equivalence.* There is no statement that the court of appeals had reviewed the entire evidence, and nothing in the decision supports an assumption that the entire evidence was reviewed.

In its opinion (Appendix B, pages 6-10) the court of appeals discusses the prosecution history of the patent in suit, apparently to support its conclusion (Appendix B, pages 9, 10) as to the scope of the claims. For purposes of this petition, petitioner accepts the

conclusion that the claims in suit are restricted to constructions including sealing rings or gaskets which function on the "O-ring principle".

This petition is specifically directed to the last seven paragraphs of the opinion (Appendix B, pages 10-12), which contain statements of *fact* apparently made to support the conclusion that respondent's gasket does not function on the "O-ring principle" and, hence, that respondent's coupling falls outside the scope of the claims in suit. It should be noted that the portions of the opinion about which petitioner complains relate entirely to *subsidiary fact issues*—issues regarding the physical properties and mode of functioning of a specific gasket. The trial court made detailed findings of fact, with references to the evidence, on each of these issues, yet the court of appeals did not review these findings or compare them with the evidence. It did not at any point in these paragraphs, or elsewhere in the opinion, refer to these findings or make any attempt to show that its contrary statements of fact were supported by the evidence. It did not state anywhere in its opinion that the findings of fact of the trial judge were not supported by substantial evidence, or were contrary to the clear weight of the evidence. Instead it merely quoted or paraphrased wholly unsupported statements from respondent's brief below, which were adopted as the substituted judgment of the court of appeals.

The opinion of the court of appeals not only fails to state explicitly that it assessed the record, but it indicates that the record was not considered at all. As demonstrated by the brief examples in Appendix C to this petition, the statements of the court of appeals are clearly contrary to the facts established by the

testimony and documentary evidence. While the correctness of these fact statements by the court of appeals is not presented for direct review in this petition, petitioner submits that the absence of evidentiary support for them as clearly demonstrated in Appendix C, shows that no fair assessment of the record was attempted.

At no point in its entire opinion does the court of appeals provide a clearcut reason for its departure from the standard of review required by Rule 52(a). There is one statement in the opinion which may provide a clue to the reason. On pages 2 and 3 of its opinion (Appendix B), the court of appeals stated:

> "The district court entered findings of fact and conclusions of law which, *except for some minor changes*, had been prepared by counsel for Johns-Manville". (emphasis added)

The decisions referred to in footnote 4 of the opinion indicate that findings of fact prepared by counsel are governed by Rule 52(a), but may be given less weight than findings prepared by the trial judge. In this case reference to counsel's participation in the preparation of the findings, and the failure of the court of appeals to follow the mandates of this Court relative to Rule 52(a), implies that the court of appeals felt it could reverse free of the "clearly erroneous" doctrine. If so, the court committed an error of law.

The findings were prepared as described below.

On February 15, 1962, counsel for petitioner was advised that the trial court had found the patent in suit to be valid and infringed. Counsel was requested to propose findings of fact and conclusions of law con-

sistent with the evidence produced by the testimony and documents at the trial.

Twelve days later counsel for petitioner presented to the trial court, for his consideration, 49 proposed findings and 17 proposed conclusions, *noting and certifying that copies of the proposed findings and conclusions had been served on counsel for respondent.* The letter accompanying the proposed findings and conclusions was a part of the record on appeal, and is reproduced as Appendix D to this petition.

In the ensuing six weeks the trial judge reviewed the proposed findings and conclusions, deleted two proposed findings altogether, made thirty-three changes in thirteen other proposed findings, deleted one proposed conclusion and revised two others. *Neither during this period nor at any other time did respondent offer any objections, comments or proposals of its own.* The trial judge made changes, corrections, additions and deletions on a copy of the proposed findings and conclusions, which was then returned to counsel for petitioner with a request that it be retyped in such form. This was done, and the papers were delivered to the court with a covering letter dated April 9, 1962, which was also a part of the record on appeal and is reproduced as Appendix E to this petition.

No motion under Rule 52(b) to amend the findings or to make additional findings, or any motion for a new trial under Rule 59, was made by respondent. Instead, respondent acquiesced without criticism in the fact findings adopted by the court and simply filed an appeal from the judgment based thereon.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

When a Court of Appeals Ignores or Violates the Requirements of Rule 52(a) and Thereby Destroys a Valuable Property Right, Is the Owner of the Right "Deprived of . . . Property Without Due Process of Law"?

Pursuant to the authority granted to it in 28 U.S.C. 2071 and 2072, this Court prescribed the Federal Rules of Civil Procedure, including Rule 52(a). The third sentence of that rule, which relates to findings of fact by trial judges, is in the form of a commandment to reviewing courts—it says "*shall not*". The rule is mandatory, not merely permissive. The fourth paragraph of 28 U.S.C. 2072 states with respect to the Federal Rules of Civil Procedure:

> "All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

It is apparent that Rule 52(a) has the force of law. This Court has stated with respect to this rule:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See United States v. Yellow Cab Co. 338 US 338, 342, ante, 150, 133, 70 S Ct 177; United States v. United States Gypsum Co. 333 US 364, 394, 395, 92 L ed 746, 765, 766, 68 S Ct 525. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'" *United States v. National Association of Real Estate Boards et al*, 339 US 485, 495, 94 L ed 1007, 1016, 70 S Ct 711.

When this mandate is ignored or violated in a decision which destroys or limits a valuable property right, the owner of that right is divested of property without due process of law. It has repeatedly been held that the Fifth Amendment of the Constitution requires that:

> "To devest an individual of his property against his consent, every substantial requisite of the law must be shown to have been complied with." *Ronkendorff* v. *Taylor's Lessee*, 29 US (4 Pet.) 349, 359, 7 L ed 882, 885.

The substantial requisites of the third sentence of Rule 52(a) depend largely on the meaning of "clearly erroneous". These words have been interpreted many times. The decision of this Court which permits reviewing courts the greatest latitude is *United States* v. *United States Gypsum Company*, 333 US 364, 394, 92 L ed 746, 765, 68 S Ct 525, where this Court stated that:

> "* * * findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight

with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." (emphasis added)

The Court then proceeded to demonstrate how the "clearly erroneous" question is to be determined in practice. It considered *the entire evidence* and compared the documentary evidence with the oral testimony before the Court. The Court then stated (333 US 396, 92 L ed 766):

> "Where such testimony is in conflict with contemporaneous documents we can give it little *weight*. . . ." (emphasis added)

The Gypsum case establishes the principle that before a reviewing court may be "left with a definite and firm conviction that mistake has been committed" and, hence, justified in setting aside fact findings as "clearly erroneous", it must have *reviewed* "the entire evidence", must have *determined* if the findings are supported by substantial evidence and, if so, have *demonstrated* that the findings are nevertheless contrary to the clear weight of the evidence. Barron & Holtzoff, Federal Practice and Procedure, Volume 2B (Wright ed. 1961), § 1135, page 550, states the principle as follows:

> "If, however, the findings of fact are supported by substantial evidence, and are not against the clear weight of the evidence the appellate court may not overturn them."

In other cases, the Fifth Circuit Court of Appeals has recognized its duty to test the record for evidence

supporting the findings below and to accept them unless clearly erroneous. *Kwong* v. *Occidental Life Insurance Co. of California*, 273 F. 2d 691, 695. It has recognized that if fair and impartial men might reasonably draw the same or different inferences from evidence presented to a trial court, findings of fact based on such evidence shall not be set aside, and that "it is not for the appellate court to substitute its judgement on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding." *Shepherd* v. *Mahannah*, 220 F. 2d 732, 739.

The importance of Rule 52(a) to the proper administration of justice, in cases such as the one at bar, has been underlined by this Court itself, in *Graver Tank & Manufacturing Co., Inc.* v. *Linde Air Products Company*, 336 US 271, 274, 93 L ed 672, 676, 69 S Ct 535, this Court stated:

> "Rule 52(a) of the Federal Rules of Civil Procedure provides in part: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' *To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations.*" (emphasis added)

Under all of the authorities referred to above, the requisites of Rule 52(a) are that detailed findings of scientific fact by a trial court *shall not* be set aside by a reviewing court unless that court upon a comparison of the findings with the entire evidence *demonstrates* that the findings either (a) are not supported by sub-

stantial evidence or (b) even though supported by substantial evidence are contrary to the clear weight of the evidence.

In the case at bar the requisites of Rule 52(a) were not complied with by the court of appeals in this case. It placed no burden on respondent or itself to *demonstrate* that the findings of fact in this case were not supported by substantial evidence or were contrary to the clear weight of the evidence. It did not state that it had reviewed the entire evidence, and nothing in the decision supports an assumption that the entire evidence was reviewed. Obviously, the evidence was not evaluated in connection with the trial court's findings of fact; there is no holding that the trial court's findings of fact are not supported by substantial evidence, nor any indication that even a single finding is unsupported by substantial evidence. Nothing is said about the weight of the evidence, nothing is said about the standard of review applied. A court of appeals decision which ignores the findings of the trial court, which ignores the evidence, which ignores Rules 52(a), which does not give regard to the opportunity of the trial court to judge of the credibility of the witnesses, and which ignores such special circumstances as deliberate copying (Appendix A, Finding 47), obviously represents a gross misapplication of the proper standard of review.

Respondent contended below that the court of appeals was not bound by Rule 52(a) because infringement and equivalence are ultimate facts and therefore in the nature of questions of law. When, however, determination of infringement depends upon disputed fact issues such as the physicial properties and mode of functioning of an element of a device, infringement

is definitely a question of fact, not a question of law, and is fully subject to the clearly erroneous rule. *Coupe et al* v. *Royer et al*, 155 US 565, 39 L ed 263, 15 S Ct 199; *United States* v. *Esnault-Pelterie*, 303 US 26, 82 L ed 625, 58 S Ct 412. Similarly, equivalence is a fact question clearly governed by Rule 52(a):

> "A finding of equivalence is a determination of fact. Proof can be made in any form: through testimony of experts or others versed in the technology; by documents, including texts and treatises; and, of course, by the disclosures of the prior art. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous." *Graver Tank & Manufacturing Company, Inc. et al* v. *Linde Air Products Company*, 339 US 605, 609, 94 L ed 1097, 1103, 70 S Ct 854.

Respondent urged the court of appeals to consider the issues of infringement and equivalence in this case "free of the clearly erroneous rule" or "subject to review free of the restraining impact of the so-called clearly erroneous rule", on the authority of its earlier decisions in *Industrial Instrument Corporation* v. *Foxboro Company*, 307 F.2d 783 (1962) and *Galena Oaks Corporation* v. *Scofield*, 218 F.2d 217 (1954). If this is what the court of appeals did, and such appears to be the case, the court erred in law, and its decision should be reviewed and reversed by this Court.

We submit that the decision of the court of appeals was completely arbitrary and capricious, and deprived petitioner of property without due process of law.

QUESTION TWO

Does the Sound Administration of Justice Require in the Application of Rule 52(a), That When a Trial Court's Detailed Findings of Scientific Fact Are Set Aside By a Reviewing Court, the Reviewing Court Must Review the Entire Evidence, must Specifically Compare the Findings With the Evidence, and Must Demonstrate in What Respect Any Findings set Aside Are Not Supported By Substantial Evidence or Are Contrary to the Clear Weight of the Evidence?

The requisites of Rule 52(a) are clearly established by the authorities discussed above and there should be no question about the propriety, in the interest of the sound administration of justice, of demanding that these requisites be fully complied with in every case. The reasons for strict enforcement of Rule 52(a), and the exercise by this Court of its supervisory authority in cases where that rule is violated, were summed up by Judge Sanborn of the Eighth Circuit Court of Appeals in the following words:

> "The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases." *Poudergrass et al* v. *New York Life Insurance Company et al*, CA 8 (1950), 181 F.2d 136, 138.

Further, any doubt as to which court is the ultimate trier of fact issues reduces the trial procedure to a farce. There is no function to be served by a trial court if the testimony and evidence and full arguments on the fact issues there presented are to be completely ignored by a court of appeals, which may substitute its own judgment of the facts for the findings of the trial

court. Not only is the confidence of litigants in decisions of the district courts impaired, their confidence in the entire judicial system is severely shaken. If a court of appeals is free to do what the Fifth Circuit Court of Appeals has done in this case, and if such practice is generally adopted, no litigation will ever end before it reaches this Court or the litigants run out of money.

The Fifth Circuit Court of Appeals has previously held it to be "well settled that, in order for a reviewing court to set aside findings of fact by a trial court sitting without a jury, it must be clearly *demonstrated* that such findings are without adequate evidentiary support in the record, or were induced by an erroneous view of the law, and the burden of showing that the findings are 'clearly erroneous' is on the one attacking them." (emphasis added) *Cedillo* v. *Standard Oil Company of Texas*, 291 F. 2d 246, 248. In its appeal to the court of appeals, respondent declined to accept this burden; the trial court findings were deliberately ignored. In such circumstances, the sound administration of justice should have led the court of appeals to dismiss the appeal summarily, and affirm the district court.

Although this petition arises out of a patent infringement action, it raises basic issues of proper review of district court decisions. It is essential in the interest of sound administration of justice that the rules of law applicable to appellate review be stated with such clarity and conciseness that appellate courts will avoid mistakes which tend to increase the number of appeals and diminish respect for our judicial system as a whole.

QUESTION THREE

May a Court of Appeals Set Aside a Trial Court's Findings of Fact for the Reason That "the District Court Entered Findings of Fact and Conclusions of Law Which, Except for Some Minor Changes, Had Been Prepared By Counsel . . ."?

In its decision, the court of appeals did not state that it was setting aside and reversing the fact findings of the district court "free of the clearly erroneous rule", nor that it was reversing the findings as "clearly erroneous". The court of appeals did state (Appendix B, pages 2, 3):

> "The district court entered findings of fact and conclusions of law which, except for some minor changes, had been prepared by counsel for Johns-Manville."

While the preparation of proposed findings and conclusions by counsel has not been universally approved, it has been recognized to be a practical necessity in many cases. When requested by a court to prepare proposed findings and conclusions for the court's consideration, counsel can hardly refuse. Indeed, some authorities hold that counsel, especially counsel for the prevailing party, *have an obligation* to a busy court in the performance of duty in that regard. Further, counsel should prepare and submit the proposed findings with reasonable promptness. Barron and Holtzoff, Federal Practice and Procedure (Wright ed. 1961) Volume 2B, § 1124, pages 493, 494.

There is no basis in law for disregarding Rule 52(a) on the ground that proposed findings and conclusions were prepared by counsel, at the request of the trial court, and this Court has repeatedly so held. In *United States* v. *El Paso Natural Gas Company*,

US , 12 L ed 2d 12, 17, 84 S Ct , this Court stated:

> "There was a trial and after oral argument the judge announced from the bench that judgment would be for respondents and that he would not write an opinion. He told counsel for respondents 'Prepare the findings and conclusions and judgment.' They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. *Those findings, though not the product of the workings of the district judge's mind, are formally his, they are not to be rejected out-of-hand, and they will stand if supported by evidence.*" (emphasis added)

In *United States* v. *Crescent Amusement Company*, 323 US 173, 184, 89 L ed 160, 169, 65 S Ct 254, an objection to findings on the ground they were taken verbatim from a party's brief was similarly treated. The Court said:

> "The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. See United States v. Forness (CCA 2d) 125 F(2d) 928, 942, 943. *But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by evidence. We think they are.*" (emphasis added)

See also *United States* v. *Oregon State Medical Society*, 343 US 326, 331, 96 L ed 978, 983, 72 S Ct 690.

In this case, the findings and conclusions proposed by counsel were not "mechanically adopted" by the trial court. The trial judge reviewed the findings and conclusions, and made numerous changes, corrections, additions and deletions. Nothing was done without the knowledge of respondent; the proposed findings and conclusions were served on counsel for respondent at the same time they were delivered to the trial judge. The proposed findings were replete with references to the testimony and the documentary evidence so that each when reviewed could be carefully checked for support. The findings adopted by the district court truly reflect the workings of his mind, and reveal the steps by which the trial court reached its ultimate conclusion on each factual issue.

If in the present case, the court of appeals set aside the trial court's findings of fact for the reason that proposed findings of fact and conclusions of law were submitted by counsel for the prevailing party, the decision of the court of appeals was clearly erroneous in law, and in conflict with prior decisions of this Court.

CONCLUSION

Complete confidence of litigants and the public in decisions of the district courts, and in the integrity of appellate review, is a matter of the highest public interest. The decision below represents a practice subversive of the proper administration of justice, and violated petitioner's constitutional rights. Certiorari

should issue from this Court in the exercise of its supervisory jurisdiction.

Respectfully submitted,

C. WILLARD HAYES
730 - 15th Street, N. W.
Washington 5, D. C.
Attorney for Petitioner

IRVIN H. RIMEL
730 - 15th Street, N. W.
Washington 5, D. C.
Of Counsel

JOHN A. MCKINNEY
JOSEPH J. KELLY
J-M Research and Engineering Center
Manville, N. J.
Of Counsel

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